IN THE MATTER OF GARY THORNTON v. NORTH AMERICAN LIFE ASSURANCE COMPANY AND CLARENDON FOUNDATION, AND PURSUANT TO HIS COMPLAINT BASED ON THE *ONTARIO HUMAN RIGHTS CODE , 1981, ch.53,* AS AMENDED.

INTERIM DECISION

BACKGROUND

On September 9, 1991 the Hon. Elaine Ziemba, Minister of Citizenship, appointed me as a board of inquiry to hear the above matter. The complaint was dated February 15, 1990 and amended on October 1991 (Exhibits 1 and 3).

Mr. Thornton ("Complainant") was employed by Clarendon Foundation and had signed forms for eligibility in group benefits with the respondent, North American Life Assurance Company ("NAL"). The group policy number is H-01-041759, and the Master Application was dated August 24, 1988.

Mr. Thornton claims that the insurance company discriminated against him by denying him long-term disability payments to which he believes he was entitled. His amended complaint (signed October 10, 1991) states at #10:

> I am a man with AIDS and I have reason to believe that my right to equal treatment with respect to services has been infringed because of my handicap in contravention of section 1 and 8 of the *Human Rights Code, 1981*, Statutes of Ontario, 1981, Chapter 53 as amended by 1984, Chapter 58, Section 39 and 1986, Chapter 64, Section 18.

NAL (who had paid Complainant short-term disability) disputes the claim, holding that the complainant was treated fairly, that he was not discriminated against in any fashion, and that his type of illness played no role in denying him long term benefits. This denial was based solely on an exclusion clause, which operates for all who are members of the group plan. The clause in the policy reads as follows:

Long Term Disability
Benefit Provisions.

2.5 Exclusions

.....

If an employee has incurred medical expenses, or received care or treatment by a Physician during the 90 day period prior to the date his insurance becomes effective. no Income Benefit shall be payable for any disability resulting from the same or related cause until:

a) the Employee has not incurred medical expenses. or received care or treatment by a Physician for a period of 90 days; or

b) the Employee has been insured for 12 consecutive months and the disability commences after this period.

.....

MOTION

The case now having proceeded to the point where Respondents will present their evidence-in-chief, counsel for NAL moved on April 13, 1992, and Clarendon Foundation concurred by letter addressed to this Board, that the proposed testimony which Complainant wishes to present and which is delineated in Exhibits 27 and 28 (attached to this Order), not be admitted:

> This is a motion brought by NAL for an order that the evidence to be adduced in these proceedings be restricted to the issues raised by the complaint.

SUMMARY OF RESPONDENTS' ARGUMENT

1. This Board's jurisdiction is limited to the instant case and consequently, hypothetical illnesses such as endometriosis. fibroid tumours and pregnancy, which are detailed in Exhibits 27 and 28, should not be considered. The function of the Board is to establish whether the rights of this Complainant have been infringed in the operation of the exclusion clause.

2. Counsel cited the Interim Order issued by this Board on Dec. 27, 1991, which stated:

> I have not been appointed to try the insurance industry...If my decision will engender consequences in one direction or another, they

will arise from our legal system which pays heed to precedent -- but that is potentially true for any Board of Inquiry. (p.5)

3. Evidence with regard to the above-mentioned diseases would lack the context necessary for these proceedings.

> While the Commission and ARCH [Advocacy Research Centre for the Handicapped] propose to adduce expert evidence concerning certain illnesses, and perhaps even the treatment of them, such evidence would be totally without context. The parties and the Board would be left to speculate about the course of any such illness in a particular case, and the claims experience of hypothetical individuals suffering from that disease. Thus, the outcome of the case of Mr. Thornton would depend not only on those concrete, ascertainable adjucative facts relating to him, but also -- if the Commission and ARCH have their way -- on a combination of abstract and hypothetical "facts" about hypothetical individuals not before the Board. (Argument, # 25)

In support of this position counsel cited a decision by the Saskatchewan Court of Appeal, *Yvonne Peters and the Saskatchewan Human Rights Commission v. University Hospital Board* (1983), 4 C.H.R.R. D/1464, which limited the Chairman's authority to the complaint before him:

> The Chairman had no authority to decide anything except Ms. Peters' complaint which was that her rights under the *Blind Persons Act* (not the *Code*) had been violated. (at ¶ 12640)

4. This limitation is not met if the Motion is denied and the Commission is permitted to extend its evidence to the matters indicated above. These proceedings deal with "adjudicative facts", namely,

> Who did what, where, when, how and with what motive or intent...Such facts are specific, and must be proved by admissible evidence (*Danson v. Attorney General of Ontario* (1990), 73 D.L.R. 686 (4th) (S.C.C.), at 695. Other decisions cited were *Borowski v. Attorney General of Canada*, [1989], 1 S.C.R., 342; and *Alfred Apsit and Laurie Gaffray v. Manitoba Human Rights Commission* (1989) 10 C.H.H.R. D/5633 (Man. C.A.) at para. 41236 and 41239.)

The need for the presentation of concrete facts is stressed by the Supreme Court of Canada, ruling on a *Charter* issue in *McKay v. Manitoba*, [1989] 2 S.C.R. 357, at 361:

> The presentation of facts is not, as stated by the respondent, a mere technicality; rather it is essential to a proper consideration of *Charter* issues.

In sum, the argument went, in deciding the complaint of Mr. Thornton, this Board should not go beyond its mandate and determine the legal scope of other disabilities, there being no complaint regarding them before it.

SUMMMARY OF COUNTER-ARGUMENT.

1. The exclusion clause is at the heart of these proceedings. Respondents have been put on notice that it is the intent of the Commission and Complainant to show that more than the proper or improper application of clause 2.5 is at stake, and that they hope to demonstrate that the clause itself is discriminatory. If that is the case it should be declared invalid, and is therefore not saved by s. 25 of the *Code*.*

2. While the clause has a wide impact in that it operates to exclude persons with various disabilities, Counsel do not advocate a *Charter*-based consideration of the issues. Rather, the Board should look at available analogies to decide the case and interpret s. 25 (24) of the *Code* in the light of the *Charter of Rights and Freedoms*, s. 1.

3. In considering the impact of particular employment practices, contracts, etc. the Board is bound to look at the effect which such actions will produce; hence all the evidence must be presented in context and not in isolation from other, broader effects.

This is especially important when the effect of of clause 2.5 can be shown to raise a barrier not only to the Complainant's claim but to whole groups of people, so that the alleged discrimination against Mr. Thornton is in fact a case of alleged systemic discrimination which affected the complainant. In *Robichaud* v. *Canada (Treasury Board)* [1987] 2 S.C.R. 84 the

* Formerly cited as section 24. Since the complaint was laid under the old numbering system I shall list the old numbers in brackets whenever indicated.

Supreme Court said of the *Canadian Human Rights Act* that it was not in doubt that if the Act was to achieve its purpose,

> the Commission must be empowered to strike at the heart of the problem, to prevent its recurrence and to require that steps be taken to enhance the work environment.

4. A Board adjudicating under the *Code* should keep in mind that the latter addresses itself to public and not merely private concerns, and that its aim is to prevent discrimination. This principle led the Supreme Court of Canada to hold that a human rights code should be given fair, large and liberal interpretations and that the rights enunciated by the law should be given their full recognition and effect (see *Canadian Human Rights Commission* v. *C.N.*, [1987] 1 S. C.R. at page 1134.; commonly referred to as *Action Travail*, at p. 1134). For the purpose of Canadian human rights legislation is not to punish offenders but rather to remove discrimination.

The Commission is a public body which is a party to the case, and the public interest remains of great concern to it. In its view, NAL's expected argument that article 2.5 of the insurance contract is saved by s. 25 (24) of the *Code*, is based on an erroneous conclusion. Therefore, a Board should not overlook the wider issues which a particular case engenders.

For all these reasons the evidence should be admitted, and only after it has been heard can the Board determine whether it was relevant and what impact it had, if any.

SUMMARY OF RESPONDENTS' REBUTTAL.

1. It is true that there is a public purpose to human rights legislation. But the fairness it demands must also extend to the respondent parties.

2. The proposed evidence will not show the real effect it will have on people in the work place. Evidence would have to be specific as to who would be affected during the first four months of employment and will be disabled for four months afterwards.

3. The proposed list of illnesses that Commission and Complainant want to bring to the Board for consideration contains only low risk examples. No medium or high risk examples have been suggested.

4. The Board must also consider what the impact of a negative ruling might be on the insurance company. Suppose the evidence is heard and on

the basis of it clause 2.5 is considered discriminatory and ordered struck from the group policy. Would the Board merely strike the clause and order nothing concrete to be put in place, in other words, let the insurance company "try to do better"? What would/should the company then do with regard to <u>any</u> pre-existing conditions? Create a precise list of long-term disabilities that are excludable under certain circumstances? This would lead to a disruption of the whole insurance process. The proposed evidence must be ruled out in the context of this hearing as being prejudicial to the company.

Or would the Board itself, in fashioning a remedy, replace the old clause with a new one? This would hardly be the purpose of the hearing.

5. Finally, there is a procedural consideration. If Respondents would have to deal with the subjects projected in Exhibits 27 and 28, it would be incumbent upon them to marshal their own evidence concerning these matters <u>now</u>, as evidence-in-chief, lest they be accused of case-splitting. This means that they would have to re-schedule their key witnesses and ask for adjournment until they can be secured.

ANALYSIS.

The motion to rule out the proposed evidence is based on a number of considerations which raise the following key issues:

1) *This Board has been appointed to try <u>this</u> case and nothing beyond it. It should deal only with the application of clause 2.5 and determine whether it prejudiced the Complainant.*

My appointment was indeed specific in that I am to deal with Mr. Thornton's complaint against NAL and to determine whether the company discriminated against him. I was <u>not</u> appointed to try the insurance industry.

However, if the alleged discrimination is shown to arise from clause 2.5 itself and not merely from its application, I must consider its impact on insured persons in a wider context. For if <u>the clause itself</u> is discriminatory, then the Complainant had just cause for his complaint. If it is not, then I shall determine -- by a full consideration of all "adjudicative facts" -- whether in the <u>application of the clause</u> Mr. Thornton was unfairly treated, and not what would happen to other hypothetical persons.

According to the Supreme Court of Canada,

> consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application. (*Andrews* v. *Law Society of B.C.* [1989] 1 S.C.R. 143, at p. 168) [Emphasis added]

I am therefore persuaded that, since the clause itself is at issue, I must consider its impact and listen to the proposed evidence concerning it.

> It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory. (The Supreme Court of Canada in *Action Travail,* at p. 1137)

As for the Respondents' argument that the Saskatchewan Court of Appeal in *Yvonne Peters et al.* (cited above) provides a precedent, I must disagree, for two reasons:

a. The citation which was adduced dealt with the question whether a complaint brought under the *Blind Persons Act* could be decided under the *Human Rights Code*. I find that this provides no analogy to the instant case.

b. I am indeed, as required, addressing Mr. Thornton's complaint which alleges that he was denied his due under a clause which is discriminatory. This is an aspect of his complaint which I am bound to consider.

I must therefore reject the argument that the presentation of the evidence will move the instant case beyond my jurisdiction. The complaint and the clause will have to be considered in their full context.

2) *The proposed testimony is not relevant, for it will lack the proper context. It will not show the real effect it will have on the work place.*

That may or may not be the case. I cannot judge the validity of the argument at this point. If the proposed evidence proves to be less than conclusive and does not provide me with a comprehensive picture -- then I will have to draw whatever conclusions will seem appropriate under the circumstances.

3. *The proposed testimony deals only with low risk cases, and not with the full gamut necessary to frame a sensible insurance policy.*

This is a matter that needs to be raised when s. 25 (24) of the Code is introduced and subjected to adversarial argument

4. *If Mr. Thornton's complaint is construed narrowly and is confined to the application of clause 2.5, the remedies available to the Board can easily be delineated. But if clause 2.5 were to become the subject of contention, such remedies would be difficult to contemplate.*

That argument anticipates that if my final Order justifies the complaint I shall be faced with grave difficulties in framing a remedy. That may indeed be so, but it cannot prevent me, at this stage of the proceedings, from considering the wider impact of clause 2.5. If I should find that the rights of Mr. Thornton have been infringed, s. 41(40) of the *Code* provides that a board of inquiry may, by order,

> (1)(a) direct the party to do anything that in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practises...

It is not possible for me to explore potential remedies until the need for them arises and until all the circumstances that lead to their imposition have been fully argued and considered.

4. *The* Code *aims at fairness, and this means that the Board must be fair not only to the Complainant but to the Respondents as well.*

I agree fully. I have therefore given special consideration to the dilemma which Respondents may now face regarding their own witnesses and their testimony. Respondents fear that they may be accused of case splitting if, after hearing arguments by Commission and Complainant, they may have to marshal additional evidence to counter them. I shall therefore take advantage of the leeway accorded to Boards of Inquiry in matters of procedure and, should such eventuality arise, permit Respondent to bring additional testimony if it appears indicated.

ORDER

The Motion is denied. Commission and Complainant may bring testimony as delineated in Exhibits 27 and 28.

Meanwhile. Respondents' testimony-in-chief should proceed as scheduled. and if at a later stage they wish to respond to the issues proposed in Exhibits 27 and 28 and advance further testimony, I shall be prepared to admit it.

TORONTO. 21 APRIL 1992

BOARD OF INQUIRY

Attached: Exhibits 27 and 28.

Ontario Human Rights Commission
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MAR 0 3 1992

March 6, 1992

BY FAX

Ms. Mary Eberts
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Dear Ms. Eberts:

Re: *Gary Thornton v. North American Life Assurance Co., et al.*

I received your letter dated March 3, 1992 today, and I understand that your office received my letter of March 5, 1992 yesterday. I have subsequently received Ms. Molloy's comments on our material and so am now in a position to comply with my undertaking to you.

The Human Rights Commission and the Complainant are alleging that clause 2.5 of the Long Term Disability Benefit Provision of North American Life's Group Health Policy with Clarendon Foundation (Cheshire Homes) Inc. violates s.5 of the *Human Rights Code* (RSO 1990) because it discriminates against several groups of persons with handicaps, including, but not restricted to, persons who are HIV+.

The Commission and Complainant further allege that clause 2.5 is not saved by s.25(3)(a) of the Code because it captures a number of persons who either do not have "pre-existing handicaps" or "pre-existing handicaps that substantially increase the risk." We will argue that the exemption clause is directed towards cost containment rather than risk assessment. Medical care or treatment will operate to exclude coverage for disorders which, generally speaking, would not represent a substantial increase in risk. In addition to calling futher evidence on the "risk" aspect of HIV+, we will be calling evidence on other medical conditions to illustrate this point.

- Persons with hypertension are generally considered to be at low risk of developing a medical condition which would make them eligible for long term disability benefits under the group health policy. It is prudent for these persons, however, to be routinely followed by a doctor to have their condition and/or medication monitored.

- Back disorders are similar such conditions. Although there are persons whose condition would place them at a high risk of disability, there are many at low risk who are routinely followed by their doctor (or other health professional) to assess their condition, to provide treatment and to monitor their medication.

Such persons might have complications requiring long term disability coverage, but there is not a substantial risk of that happening. Therefore, the policy's exclusion clause is overly broad, not directed towards risk and not within the s.25(3)(a) defence.

- There are people who develop conditions for which they seek medical care or treatment, who very quickly go on to develop seriously disabling conditions. Such conditions include cancer and spinal injuries.

- There are persons who are receiving medical care or treatment for reasons not related to disabling conditions (eg. birth control), who subsequently have disabling reactions to this care or treatment.

It is entirely possible in the first example that these conditions could develop after such persons have commenced employment (or alternatively, after the contract of insurance has been entered), which would mean they were not "pre-existing" conditions. In the latter example, persons could be caught by the exclusion who did not have a "condition," pre-existing or otherwise.

To avoid duplication of evidence and the possibility of splitting our case, it is anticipated that the Commission and the Complainant will be calling the above evidence in reply rather than in their respective cases in chief. We will advise you if we intend to call further evidence on this point.

Thank you for your cooperation on this matter.

Yours very truly,

Naomi Overend

cc: Anne Molloy
Stephen Bernofsky
Susan Ursel

Exhibit 28

ARCH
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March 8, 1992

Ms Mary Eberts
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BY FAX

Dear Ms Eberts:

Re: Gary Thornton v. North American Life Insurance Co., et al.

This letter is in addition to Ms Overend's letter of March 6, 1992, which we received by fax. As Mr. Thornton's counsel, we plan to call additional expert evidence on the following gynaecological issues:

1. Endometriosis

The expert evidence will address the fact that endometriosis is a condition for which women seek regular care and treatment. Although for the vast majority of women endometriosis is treatable and would at most give rise to a short term disability claim, it is a condition which could result in a claim for Long Term Disability coverage in a rare number of cases. Thus endometriosis is not a condition which substantially increases the risk, but a claim for Long Term Disability coverage would be excluded by your policy solely on the basis of the timing of medical treatment rather than risk assessment.

2. Fibroid Tumors

The expert evidence will address the fact that fibroid tumors is another common condition for which women seek regular care and treatment. In the vast majority of cases, this condition would result in no claim for disability benefits. However, in rare circumstances these tumors may become malignant and could result in a long term disability claim. Again, this is not a condition which substantially increases the risk, but a claim for Long Term Disability coverage would be excluded by your policy.

3. Pregnancy

We will advance expert evidence of the impact of this policy on pregnant women. The expert evidence will address the fact that pregnant women have regular care and treatment by their physicians. Pregnancy, is not a condition which substantially increases the risk of a claim for Long Term Disability coverage. Nonetheless, there are some pregnancy-related conditions which could give rise to disability and the need for long term care. Examples include blood clots, heart attacks, strokes, kidney failure, convulsions, and haemorrhages to the brain. These disabling conditions would be rare, but they do occur in some cases and could give rise to a long term disability claim. If the pregnant woman saw her doctor during her first 90 days of employment and subsequently became disabled by a pregnancy-related condition, her long term disability claim would be excluded by your policy.

Thank you for your cooperation in this matter.

Yours truly,

Gale Molloy
Counsel
gh/

cc. Naomi Overend
Stephen Bernofsky
Susan Ursel